

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN
PARTY, BERTABELLE HUBKA, STEVE
NEIGHBORS, MARCY COLLINS,
MICHAEL YOUNG, DIANE TEBELIUS,
MIKE GASTON,

Plaintiffs,

and

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE, PAUL
BERENDT,

Plaintiff-Intervenors,

and

LIBERTARIAN PARTY OF
WASHINGTON STATE, RUTH BENNETT,
J. S. MILLS,

Plaintiff-Intervenors,

v.

WASHINGTON STATE GRANGE,

Defendant-Intervenor,

Case No. C05-0927-JCC

ORDER

1 and

2 STATE OF WASHINGTON, ROB
3 MCKENNA, SAM REED,

4 Defendant-Intervenors.

5 This matter comes before the Court on Defendant-Intervenor State of Washington's
6 ("Washington") motion for summary judgment (Dkt. No. 239), Plaintiff-Intervenor
7 Washington State Democratic Central Committee's ("Democratic Party") motion for partial
8 summary judgment (Dkt. No. 247), Defendant-Intervenor Washington State Grange's
9 ("Grange") motion for summary judgment (Dkt. No. 249), Plaintiff Washington State
10 Republican Party's ("Republican Party") motion for partial summary judgment (Dkt. No. 250),
11 Washington's motion to strike certain witnesses (Dkt. No. 287), and the parties' multiple
12 responses and replies, including those of Plaintiff-Intervenor Libertarian Party of Washington
13 State ("Libertarian Party"). Having thoroughly considered the parties' briefing and the relevant
14 record, the Court finds oral argument unnecessary and grants in part and denies in part
15 Washington's and the Grange's motions for summary judgment (Dkt. Nos. 239, 249). The
16 Court likewise grants in part and denies in part the Democratic and Republican Parties'
17 motions for partial summary judgment (Dkt. Nos. 247, 250). The Court concludes that I-872 as
18 implemented in partisan elections is constitutional because the ballot and accompanying
19 information eliminate the possibility of widespread confusion among the reasonable, well-
20 informed electorate. The Court further concludes that Washington's method of electing
21 political-party precinct committee officers is unconstitutional because it allows non-party
22 members to vote for officers of the political parties. The Court strikes the trial date and denies
23 as moot the pending motion to strike certain witnesses.

24 I. BACKGROUND

25 From 1935 until 2003, candidates for state and local office in Washington State were
26 nominated through a "blanket primary," whereby all candidates from all parties were placed on

1 a single ballot and voters could select a candidate from any party. *See Wash. State Grange v.*
2 *Wash. State Republican Party*, 552 U.S. 442, 445 (2008). The candidate who won the plurality
3 of votes within each major party became that party's nominee in the general election. *Id.* The
4 Ninth Circuit Court of Appeals, relying on the Supreme Court's landmark decision in
5 *California Democratic Party v. Jones*, 530 U.S. 567 (2000), struck down Washington's
6 blanket-primary system because that system violated the political parties' First Amendment
7 right of free association by mandating that those parties allow nonmembers to participate in
8 selecting their nominees. *Democratic Party of Wash. State v. Reed*, 343 F.3d 1198, 1207 (9th
9 Cir. 2003).

10 In 2004, Washington voters approved Initiative 872 ("I-872"), which established a new
11 primary system. *Wash. State Grange*, 552 U.S. at 446–47. Under this system, all elections for
12 "partisan office" start with a primary in which every candidate filing a "declaration of
13 candidacy" competes. *Id.* at 447. Each candidate declares his or her "party preference or
14 independent status," which is designated on the primary ballot with the candidate's name. *See*
15 *id.*; Wash. Rev. Code § 29A.24.031(3). A candidate may state a party preference for any party
16 he or she desires, even if that political party would itself prefer otherwise. *See Wash. State*
17 *Grange*, 552 U.S. at 447. Voters may select any candidate listed on the ballot, regardless of
18 party preference, and the two candidates that receive the highest votes, also regardless of party
19 preference, advance to the general election. *Id.* at 447–48; Wash. Rev. Code § 29A.52.112(2).
20 In this manner, the general election becomes a runoff between the top-two vote getters in the
21 primary.

22 On May 19, 2005, the Republican Party filed this action to have I-872 declared
23 unconstitutional and to enjoin its implementation. (Dkt. No. 1.) That same day, the Democratic
24 Party and Libertarian Party moved to intervene as plaintiffs. (Dkt. Nos. 2, 3.) The Republican
25 Party alleged that the new election scheme (1) compels it to associate with any candidate who
26 expressed a "preference" for the party, thereby diluting the party's message; (2) allows

1 candidates to “appropriate” the party’s name without permission; (3) allows party nominees to
 2 be determined by voters whose beliefs were antithetical to those of the party, in violation of
 3 *Jones*, 530 U.S. at 586; and (4) impermissibly denies major parties protections that it offers to
 4 minor parties, in violation of the Equal Protection Clause.¹ (Dkt. No. 1 at 5–7.) The
 5 Democratic Party made identical claims. (*See* Dkt. No. 31.) The Libertarian Party made similar
 6 First Amendment claims; additionally, it alleged that I-872 arbitrarily deprived minor parties
 7 access to the general election ballot.² (*See* Dkt. No. 28.)

8 The Court set an expedited briefing schedule and required that the parties stipulate to
 9 the legal issues that would be covered in the motions. (*See* Dkt. Nos. 40, 45.) On July 15, 2005,
 10 the Court³ granted the political parties’ motions for summary judgment. (Dkt. No. 87.) The
 11 Court held that I-872 still served to “nominate” party candidates, despite Washington’s
 12 characterization of I-872 as a “winnowing” or a “qualifying” primary. (*Id.* at 25–26.) On the
 13 basis of that holding, the Court concluded that I-872 was unconstitutional on two grounds:
 14 First, like the blanket primary invalidated in *Jones*, the I-872 primary “force[d] political parties
 15 to associate with—to have their nominees, and hence their positions, determined by—those
 16 who, at best have refused to affiliate with the party, and, at worst, have expressly affiliated
 17 with a rival,” in violation of the freedom of association. (*Id.* at 28.) Second, the Court held that

18
 19 ¹ Prior to the enactment of I-872, minor-party candidates, unlike major-party
 20 candidates, were selected through party nominating conventions. (*See* Dkt. No. 87 at 5.) The
 21 Republican Party premised its equal-protection argument on its understanding that these
 provisions survived the enactment of I-872.

22 ² Whereas the Republican and Democratic Party’s equal-protection arguments were
 23 premised on the assumption that minor parties could still nominate their candidates through
 24 nomination conventions, the Libertarian Party’s ballot-access argument was based on the
 25 reverse assumption—that I-872 did not distinguish between major and minor parties, so the
 only way for a candidate to advance to the general election was to be in the two highest vote
 getters. (*See* Dkt. No. 28.)

26 ³ Judge Thomas S. Zilly presided over the initial stages of this litigation.

1 by “allowing *any* candidate, including those who may oppose party principles and goals, to
2 appear on the ballot with a party designation,” I-872 would “foster confusion and dilute the
3 party’s ability to rally support behind its candidates.” (*Id.* at 30.) The Court concluded that the
4 unconstitutional provisions of I-872 could not be severed from the remaining provisions and
5 therefore struck down the initiative in its entirety. (*Id.* at 38–39.)

6 The Ninth Circuit affirmed. *Wash. State Republican Party v. Washington*, 460 F.3d
7 1108, 1125 (9th Cir. 2006). The Ninth Circuit held that a candidate’s self-identification of
8 party preference necessarily created an association between the candidate and the party. *Id.* at
9 1119–20. By allowing candidates to create such an association against the party’s will, I-872
10 constituted “a severe burden on political parties’ associational rights” that could not be
11 justified as narrowly tailored to compelling state interests. *Id.* at 1121, 1123. Accordingly, the
12 Ninth Circuit held that I-872 was unconstitutional on its face. *Id.* at 1124.

13 The Supreme Court, however, granted certiorari and reversed on the merits. *Wash.*
14 *State Grange*, 552 U.S. at 459. The Supreme Court emphasized that the political parties’
15 challenge, as it had appeared before the lower courts, was to I-872’s constitutionality on its
16 face and hence could only succeed if Plaintiffs demonstrated that “the law [was]
17 unconstitutional *in all of its applications*.” *Id.* at 449 (emphasis added); *see also id.* (“[A]
18 plaintiff can only succeed in a facial challenge by establishing that no set of circumstances
19 exists under which the Act would be valid” (quotation marks omitted)). Significantly, the
20 Supreme Court concluded that “the I-872 primary does not, by its terms, choose parties’
21 nominees. . . . Whether parties nominate their own candidates outside the state-run primary is
22 simply irrelevant. In fact, parties may now nominate candidates by whatever mechanism they
23 choose because I-872 repealed Washington’s prior regulations governing party nominations.”
24 *Id.* at 453. If a political party chose to nominate a candidate through outside means, that
25 nomination would not be so designated on the ballot, but “[t]he First Amendment does not give
26 political parties a right to have their nominees designated as such on the ballot.” *Id.* at 453 n.7.

1 The Supreme Court further determined that each of the political parties' arguments
2 relied on an assumption that voters would *misinterpret* a candidate's self-identified party
3 preference as some form of endorsement by or association with the political party. *Id.* at 454.
4 Having concluded that each of the political parties' arguments "rests on factual assumptions
5 about voter confusion," the Supreme Court held that "each fails for the same reason: In the
6 absence of evidence, we cannot assume that Washington's voters will be misled." *Id.* at 457.
7 Holding that any potential confusion "will depend in significant part on the form of the ballot,"
8 the Supreme Court explained that I-872 could be implemented in such a way as to make clear
9 that a candidate's party-preference designation does not constitute an endorsement of or
10 association with that political party. *Id.* at 455; *see also id.* at 456 ("[We must] ask whether the
11 ballot could conceivably be printed in such a way as to eliminate the possibility of widespread
12 voter confusion and with it the perceived threat to the First Amendment."); *id.* at 460 (Roberts,
13 C.J., concurring) (emphasizing the importance of the form of the ballot with respect to possible
14 voter confusion). Accordingly, the Supreme Court rejected the political parties' facial
15 challenge to I-872. *Id.* at 457–59.

16 On remand, the Ninth Circuit vacated its opinion and remanded the case back to this
17 Court with instructions to (1) "dismiss all facial associational rights claims challenging [I-
18 872]"; (2) "dismiss all equal protection claims," because I-872 repealed the regulations
19 differentiating between major and minor parties; and (3) "dismiss as waived all claims that [I-
20 872] imposes illegal qualifications for federal office, sets illegal timing for federal elections or
21 imposes discriminatory campaign finance rules because these claims were neither pled by the
22 parties nor addressed in summary judgment by the district court." *Wash. State Republican*
23 *Party v. Washington*, 545 F.3d 1125, 1126 (9th Cir. 2008). In contrast, the panel suggested that
24 this Court "may allow the parties to further develop the record with respect to the claims that
25 [I-872] unconstitutionally constrains access to the ballot." *Id.*

26 Thereafter, Defendants Washington and the Grange moved to dismiss this action in its

1 entirety (Dkt. Nos. 133, 134), and the Republican and Democratic Parties sought leave to
2 amend their Complaints (Dkt. Nos. 137, 140). They sought to supplement the Complaints with
3 additional factual allegations to support as-applied challenges to the implementation of I-872
4 that Washington adopted after the Supreme Court's decision. (*See* Dkt. No. 137 at 8; Dkt. No.
5 140 at 2.) The Court concluded that the political parties had already alleged as-applied
6 challenges to I-872's primary scheme and that those claims remained unresolved. (Dkt. No.
7 184 at 8.) The Court determined that the political parties could submit evidence to demonstrate
8 that (1) the State's actual implementation of I-872 (including its interaction with the state's
9 campaign disclosure laws) leads to voter confusion and (2) that this resulting confusion
10 severely burdens the political parties' freedom of association. (*Id.* at 11.) The Court further
11 concluded that Plaintiffs could demonstrate that the application of I-872 to certain elected
12 offices (i.e., party precinct committee officers) specifically burdens the party's right to
13 associate. (*Id.*)

14 The political parties have amended their complaints, alleging that I-872 is
15 unconstitutional as applied in Washington because it creates voter confusion that
16 unconstitutionally infringes on their First Amendment associational freedoms. The political
17 parties also allege that Washington's implementation of the election for the parties' precinct
18 committee officers in light of I-872 violates their associational rights. Washington, the Grange,
19 and the political parties have at this crucial juncture marshaled their evidence—offering in
20 particular the form of ballot used in Washington—and they ask the Court to finally resolve this
21 long-running saga over the form of political elections in Washington.⁴

22
23 ⁴ Washington, the Grange, and the political parties all seek summary judgment on all
24 the issues presented. Although the filing of cross-motions for summary judgment does not
25 vitiate the Court's responsibility to determine whether disputed issues of material facts are
26 present, *see Fair Hous. Council of Riverside Cnty. v. Riverside Two*, 249 F.3d 1132, 1136 (9th
Cir. 2001), the universal request for summary judgment strongly indicates that this case is ripe
for resolution. The political parties do not dispute the manner in which Washington has

1 II. DISCUSSION

2 A. Absence of Voter Confusion

3 As applied, Washington's implementation of I-872 "eliminate[s] the possibility of
4 widespread voter confusion and with it the perceived threat to the First Amendment." *See*
5 *Wash. State Grange*, 552 U.S. at 456. The Supreme Court held that the political parties'
6 assertion that voters will misinterpret the party-preference designation is "sheer speculation"
7 that depends on the erroneous belief that voters can be misled by party labels. *Id.* at 454. The
8 Supreme Court elaborated that its cases "reflect a greater faith in the ability of individual
9 voters to inform themselves about campaign issues" and that there is "no basis to presume that
10 a *well-informed electorate* will interpret a candidate's party-preference designation to mean
11 that the candidate is the party's chosen nominee or representative or that the party associates
12 with or approves of the candidate." *Id.* (emphasis added).

13 The Supreme Court was unable to review whether I-872 in operation would confuse the
14 reasonable, well-informed electorate because Washington had not yet developed the ballot and
15 accompanying informational material that voters would receive during the election cycle and
16 on Election Day. Now that Washington has deployed I-872, this Court can thoroughly evaluate
17 it. Washington's ballot contains a prominent, unambiguous, explicit statement that a
18 candidate's party preference does not imply a nomination, endorsement, or association with the
19 political party. The ballot repeatedly states that candidates merely "prefer" the designated
20 parties. Ballot inserts and the Voters' Pamphlet further explain the new system. Washington
21 employed a widespread education campaign via various media outlets to inform voters about
22 the new system. And Washington voters themselves, not simply their elected representatives,
23

24
25 implemented I-872; they challenge the constitutionality of that implementation. Moreover, no
26 one has requested a jury trial. The Court concludes that the record is sufficiently developed to
resolve this dispute without a bench trial.

1 approved I-872. These factors demonstrate to the Court that Washington's implementation of
2 I-872 eliminates the possibility of widespread confusion among the reasonable, well-informed
3 electorate.

4 Most persuasive, the ballot Washington uses to implement I-872 is uniformly consistent
5 with the Supreme Court's conception of a constitutional ballot. The Supreme Court
6 emphatically maintained that "whether voters will be confused by the party-preference
7 designations will depend in significant part on the form of the ballot." *Id.* at 455; *see also id.* at
8 460 (Robert, C.J., concurring) ("What makes this case different . . . is the place where the
9 candidates express their party preferences: on the ballot. And what makes the ballot 'special' is
10 precisely the effect it has on voter impressions. . . . If the ballot is designed in such a manner
11 that no reasonable voter would believe that the candidates listed there are nominees or
12 members of, or otherwise associated with, the parties the candidates claimed to 'prefer,' the I-
13 872 primary system would likely pass constitutional muster." (citations omitted)). When
14 considering "whether the ballot could conceivably be printed in such a way as to eliminate the
15 possibility of widespread voter confusion," the Supreme Court concluded that such a ballot "is
16 not difficult to conceive." *Id.* at 456.

17 The Supreme Court explained that a constitutional ballot "could include prominent
18 disclaimers explaining that party preference reflects only the self-designation of the candidate
19 and not an official endorsement by the party." *Id.* at 456. The Washington ballot does precisely
20 that. Each ballot contains the following prominent and clear explanation:

21 READ: Each candidate for partisan office may state a political party that he or
22 she prefers. A candidate's preference does not imply that the candidate is
23 nominated or endorsed by the party, or that the party approves of or associates
with that candidate.

24 (Dkt. No. 242 at 4.) The Washington Secretary of State requires that that this language appear
25 on primary- and general-election ballots. Wash. Admin. Code § 434-230-015(4)(a). This clear
26 explanation included on the ballot may alone be sufficient to withstand the political parties'

1 constitutional concerns about the possibility of confusion among the well-informed electorate.

2 But Washington does more. The Supreme Court stated that Washington could provide
3 “explanatory materials mailed to voters along with their ballots.” *Id.* at 456. Washington so
4 complies. Voters’ Pamphlets must include “an explanation that each candidate for partisan
5 office may state a political party that he or she prefers, and that a candidate’s preference does
6 not imply that the candidate is nominated or endorsed by the party or that the party approves of
7 or associates with that candidate. The pamphlet must also explain that a candidate can choose
8 to not state a political party preference.” Wash. Admin. Code § 434-381-200. A statement
9 nearly identical to the ballot disclaimer also appears along with each mailed ballot for the
10 primary and general election.⁵ *Id.* § 434-250-040(1)(j)–(k) (“Washington has a new primary.
11 You do not have to pick a party. In each race, you may vote for any candidate listed. The two
12 candidates who receive the most votes in the August primary will advance to the November
13 general election. Each candidate for partisan office may state a political party that he or she
14 prefers. A candidate’s preference does not imply that the candidate is nominated or endorsed
15 by the party, or that the party approves of or associates with that candidate.”). In addition to
16 including the same information in the Voters’ Pamphlet mailed to every voter in the state,
17 many Voters’ Pamphlets provide further explanation of how the new system operates. (Dkt.
18 No. 245 at 9 (“Our new Top 2 Primary on August 19 will give you maximum choice, allowing
19 you the independence and freedom to ‘vote for the person, not the party.’ . . . Our new voter-
20 approved primary no longer nominates a finalist from each major party, but rather sends the
21 two most popular candidates forward for each office. It’s a winnowing election to narrow the
22 field. Your candidates have listed the party they prefer, but that doesn’t mean the party
23 endorses or affiliates with them.”).) The cover of the 2008 Voters’ Pamphlet also included an

25 ⁵ Notably, approximately 90 percent of the Washington electorate votes via mail. *Wash.*
26 *State Grange*, 552 U.S. at 456 n.8.

1 explanation of the top-two system and of the candidates' statements of personal party
2 preference. (*Id.* at 8.)

3 The Supreme Court also held that "the State could decide to educate the public about
4 the new primary ballots through advertising." *Wash. State Grange*, 552 U.S. at 456.
5 Washington again complies. Washington conducted an extensive voter education campaign
6 designed to explain the new election system to voters. The 2008 education campaign included,
7 among other things, a detailed Web site and a series of public-service announcements run on
8 television and radio stations during the primary- and general-election seasons. (Dkt. No. 246 at
9 8–22.) Transcripts from these advertisements reinforced the point: "A candidate's party
10 preference doesn't mean the party endorses or approves of that candidate." (*Id.* at 20.)

11 Finally, the Supreme Court explained that ballots "might note preference in the form of
12 a candidate statement that emphasizes the candidate's personal determination rather than the
13 party's acceptance of the candidate." *Wash. State Grange*, 552 U.S. at 456. Although the ballot
14 does not include a separate statement such as "I, John Doe, prefer the Democratic Party," the
15 ballot explicitly states under each candidate name that the candidate "prefers" a particular party
16 (e.g., "(Prefers Republican Party)"). (Dkt. No. 242 at 4.) The statement does not say that the
17 political party approves of the candidate or even that the party endorses the candidate; it states
18 only a personal preference.⁶ Nor does the statement include a simple abbreviation like "D" or
19 "R" coupled with the absence of a statement of preference. It is obvious from the ballot format
20 that the party-preference statement is merely that—a preference—that does not imply one way
21 or another whether the political parties endorse, approve, or affiliate with that candidate. The
22 Supreme Court held that it was "satisfied that there are a variety of ways in which the State

23
24 ⁶ Tellingly, in the party precinct-committee-officer races where voters select a political
25 party's representative, listed below the candidate's name is a clear statement of party
26 affiliation, and it omits the passive parentheses (e.g., "Republican Party Candidate"). (Dkt. No.
243 at 4).

1 could implement I-872 that would eliminate any real threat of voter confusion.” *Wash. State*
2 *Grange*, 552 U.S. at 456. Washington has implemented I-872 uniformly consistent with several
3 of the “ways” the Supreme Court envisioned would be consistent with the Constitution, and
4 this Court therefore concludes that I-872 complies with the Constitution.

5 The standard by which the Court must evaluate the possibility of widespread confusion
6 is from the perspective of a reasonable, well-informed electorate. *See Wash. State Grange*, 552
7 U.S. at 456. Yet the political parties offer evidence of what they contend shows actual voter
8 confusion that is both irrelevant and unpersuasive. For example, the parties offer evidence of
9 newspaper articles and other materials showing that some voters and news media speak loosely
10 about the relationship between political parties, the candidates, and the election process. (*See*
11 *Dkt. No. 257 at 6–8; Dkt. No. 260 at 3–6; Dkt. No. 272 at 9.*) That is, some speakers, perhaps
12 using shorthand, indicate that a candidate who lists a particular party preference on the ballot is
13 in fact that party’s nominee. Washington cannot control what the newspapers print, lest it run
14 afoul of yet another provision of the First Amendment, freedom of the press. Nor can
15 Washington be held responsible for the words used by private parties that might foster some
16 negligible confusion. And to the extent that state officials have occasionally used similarly
17 loose language, those isolated incidents do not show the type of widespread voter confusion
18 the Supreme Court contemplated in its review.

19 The political parties additionally argue that not all voters read the ballot instructions or
20 the instructional material included with the ballot. That may be true, but a voter who ignores or
21 refuses to read basic ballot instructions is no longer a reasonable voter, and surely not a well-
22 informed one. The Court cannot and will not consider the constitutionality of I-872 from the
23 viewpoint of such an unreasonable, uninformed voter.

24 The Court also declines the political parties’ invitation to review the possibility for
25 voter confusion under traditional trademark analysis. (*See Dkt. No. 257 at 18–20.*) Quite
26 simply, trademark law does not lie in the First Amendment associational rights implicated in

1 this matter. Trademark law is designed to protect the proprietary rights of private parties from
2 improper commercial uses. This case does not involve the propriety rights of the political
3 parties or Washington's commercial use of any trademark.⁷ The comparison is inapposite.

4 The political parties also argue that I-872 has harmed them because some of their
5 official nominees have not advanced past the primary election to the general election. (Dkt.
6 No. 257 at 11–14.) The Democratic Party complains, for example, that in one particular race its
7 official nominee lost the primary election because “the Democratic Party was forced by the
8 State’s implementation of the Top Two [system] to have three other ‘Democratic candidates’
9 on the [primary] ballot” alongside the Democratic Party’s chosen nominee. (Dkt. No. 257 at
10 13.) The argument misses the point: “Whether parties nominate their own candidates outside
11 the state-run primary is simply irrelevant. In fact, parties may now nominate candidates by
12 whatever mechanism they choose because I-872 repealed Washington’s prior regulations
13 governing party nominations.” *Wash. State Grange*, 552 U.S. at 453. The primary ballot did
14 not include “three other Democratic candidates.” It included four candidates who stated a
15 preference for the Democratic Party, one of whom the Democratic Party officially endorsed.
16 “The First Amendment does not give political parties a right to have their nominees designated
17 as such on the ballot,” *id.* at 453 n.7, and the political parties are not entitled as a matter of law
18 to have their nominated candidates appear on the general-election ballot. I-872 did not prevent
19 the Democratic Party’s nominee from advancing to the general election; the voters did. The
20 political parties may not admire Washington’s new election system in which their designated
21 candidates do not always advance to the general election, but that disappointment does not
22 raise constitutional concerns.

23
24 ⁷ Although it does not wholly resolve the matter, the Court previously concluded that,
25 as presented, “the State’s expression of candidates’ party preference on the ballot and in the
26 voter pamphlets may not form the basis of a federal or state trademark violation.” (Dkt. No.
184 at 17.)

1 The political parties also offer as evidence a study purporting to show that voters
2 presented with the new ballots were confused about candidates' political-party association, or
3 lack thereof. (Dkt. No. 265-1 at 10–48.) It is not entirely clear whether the Court should
4 consider such a study—particularly given the study's limited parameters that did not include
5 all of the educational information provided to voters—when the Court is presented with a legal
6 question of whether the implementation of I-872 would create the possibility for widespread
7 confusion among a reasonable, well-informed electorate. *See Wash. State Grange*, 552 U.S. at
8 461–62 (Roberts, C.J., concurring) (“Nothing in my analysis requires the parties to produce
9 studies regarding voter perceptions on this score, but I would wait to see what the ballot says
10 before deciding whether it is unconstitutional.”). For example, the federal courts consider in
11 their Establishment Clause jurisprudence whether a reasonable observer—mindful of the
12 history, purpose, and context of a government monument or practice—would perceive a
13 government endorsement of religion without resort to social or cognitive experiments. *See*,
14 *e.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005); *Barnes-Wallace v. City of San Diego*, 607 F.3d
15 1167, 1175 (9th Cir. 2010) (“The United States Supreme Court adopts the perspective of a
16 reasonable observer when determining Establishment Clause questions.”). The Court sees no
17 reason why a different approach should apply here.

18 It seems particularly unwise to resort to these experiments in this context because a
19 battle of experts would likely emerge revealing no clear answer from competing social
20 experiments. Furthermore, the political parties have not shown how widespread voter
21 confusion among a reasonable, well-informed electorate may be systematically and reliably
22 measured or what its measured results may require. For example, what is the constitutional
23 result if studies show that voters in one particular county fully understand the top-two system
24 while voters in another county do not? What is the constitutional result if government officials
25 in a county that purportedly does not understand the electoral system embark on an aggressive
26 educational campaign immediately thereafter? Must the county then affirmatively show the

1 federal courts through a subsequent study that its citizens are wise enough to join their
2 neighbors who use the top-two system? How would varying county standards apply to
3 statewide offices? These questions remain unanswered. Social science experiments and studies
4 are exceptional tools for improved understanding of society, and the Court does not intend to
5 diminish their general value. But their applicability to the nuances of constitutional review in a
6 case such as this do not, as of yet, appear particularly practical.⁸

7 In any event, the political parties have not shown under the offered study that
8 Washington's implementation of I-872 has created the possibility of widespread voter
9 confusion among a reasonable, well-informed electorate. The study is neither limited to
10 Washington voters nor inclusive of the entire state's electorate. The "new voters" the study
11 evaluated were students at one university, which likely included residents from outside
12 Washington. (*See* Dkt. No. 265 at 3.) The study does not establish what percentage of
13 participants tested are likely to vote in an election. The study drew its "active voters" from e-
14 mails provided by the Republican and Democratic Parties. (*Id.*) And the Court is unaware if
15 representatives from all Washington counties participated.

16 Nowhere does the study evaluate whether the selected individuals represent the
17 _____

18 ⁸ The Court need not rely on Washington's expert to conclude that the presence of
19 general confusion about matters of politics and elections is common. (*See* Dkt. No. 279 at 8.) If
20 any political party—or voter for that matter—must only show the presence of some confusion
21 in order to successfully challenge the constitutionality of an electoral system, then any method
22 of conducting partisan elections would be vulnerable to constitutional attack. *See Storer v.*
23 *Brown*, 415 U.S. 724, 730 (1974) ("[T]here must be a substantial regulation of elections if they
24 are to be fair and honest and if some sort of order, rather than chaos, is to accompany the
25 democratic process."). In a state whose population is fast approaching seven million residents,
26 the political parties are bound to find voters who are confused about the electoral process. But
the political parties have not shown that Washington's implementation of I-872, as opposed to
a basic misunderstanding of the electoral system, creates any widespread confusion. And with
each passing election, the number of uninformed voters should gradually decline. Moreover, it
is unreasonable to conclude that Washington citizens may never change their electoral system
simply because some voters have grown accustomed to and understand the current system.

1 reasonable, well-informed voter from Washington. To the point, the study did not provide its
2 participants with the explanatory materials mailed to voters along with their ballots, and the
3 study makes no reference to whether its participants were exposed to Washington's education
4 campaign conducted through various media outlets. Moreover, the study participants did not
5 receive a ballot consistent with the one Washington actually uses. Washington administrative
6 code requires that the important disclaimer regarding the lack of party association appear
7 "immediately *above* the first partisan congressional, state or county office." Wash. Admin.
8 Code § 434-230-015(4)(a) (emphasis added). Yet the ballots used in the study placed the notice
9 on the bottom-left corner, *below* the first partisan race. (Dkt. No. 265-1 at 32–33.) Moreover,
10 Washington law requires that the notice say, "READ." Wash. Admin. Code § 434-230-
11 015(4)(a). But the notice in the study said, "VOTERS-PLEASE READ," which participants
12 may have interpreted as a passive request rather than a mandatory instruction. The Court does
13 not know how those changes may have affected the study's results, and the Court is
14 unconvinced that the study accurately reflects the well-informed electorate—an electorate in
15 whom the Supreme Court has noticeable confidence.⁹ *See Wash. State Grange*, 552 U.S. at 455
16 ("Our cases reflect a greater faith in the ability of individual voters to inform themselves about
17 campaign issues.").

18 Finally, the Court rejects the contention that Washington's financial disclosure laws
19 create the possibility for widespread confusion among the reasonable, well-informed
20 electorate. Washington law requires that "[f]or partisan office, if a candidate has expressed a
21 party or independent preference on the declaration of candidacy, that party or independent
22 designation shall be clearly identified in electioneering communications, independent
23

24
25 ⁹ The Court applies the same principles to the political parties' reliance on the "Elway
26 Research," which did not present to its participants the ballot Washington implemented. (*See*
Dkt. No. 260 at 6.)

expenditures, or political advertising.” Wash. Rev. Code § 42.17.510(1). As the Public Disclosure Commission details, the law requires that a candidate disclose his or her stated party *preference*: “All forms of advertising must clearly state a candidate’s party preference if the candidate is seeking partisan office.”¹⁰ See Public Disclosure Commission’s 2008 “Political Advertising” Brochure, <http://www.pdc.wa.gov/archive/guide/brochures/pdf/2008/2008.Bro.Adv.pdf>. Under the Court’s freedom-of-association analysis, these disclosure requirements, which speak of a candidate’s party “preference,” do not create the type of voter confusion that would result in an unconstitutional burden on the political parties’ First Amendment rights.¹¹

Accordingly, the Court concludes that Washington’s implementation of I-872 does not create the possibility of widespread confusion among the reasonable, well-informed electorate.

¹⁰ The political parties contend that the Public Disclosure Commission confuses voters by occasionally referring to political “affiliation.” (See Dkt. No. 260 at 16.) But the Commission’s rules make clear that any reference to “affiliation” means merely the candidate’s stated party preference. Wash. Admin. Code § 390-05-274 (“‘Party affiliation’ as that term is used in chapter 42.17 RCW and Title 390 WAC means the candidate’s party preference as expressed on his or her declaration of candidacy. A candidate’s preference does not imply that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate. . . . A reference to ‘political party affiliation,’ ‘political party,’ or ‘party’ on disclosure forms adopted by the commission and in Title 390 WAC refers to the candidate’s self-identified party preference.”).

¹¹ The Court also rejects the Republican Party’s one-paragraph contention that Washington’s campaign-finance laws unconstitutionally interfere with its ability to communicate with its members. (See Dkt. No. 260 at 19–20.) The Republican Party alleges that because political parties nominate candidates outside the state’s primary system, Washington’s campaign-finance laws no longer serve a compelling governmental interest. (See *id.*) But the elimination of the state-funded nomination process neither eliminated the pervasiveness of money in politics nor the government’s paramount interest in curtailing corruption or the appearance of corruption of elected officials. Moreover, the Republican Party does not sufficiently respond to Washington’s assertion that this legal issue currently stands before the state court. See *State ex rel. Wash. State Public Disclosure Comm’n v. Wash. State Republican Party*, King County Superior Court No. 08-2-34030-9.

Therefore, Washington does not need to assert a compelling governmental interest in pursuing I-872. Its previously asserted interest “in providing voters with relevant information about the candidates on the ballot is easily sufficient to sustain I-872.” *Wash. State Grange*, 552 U.S. at 458; *see also Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983) (“There can be no question about the legitimacy of the State’s interest in fostering informed and educated expressions of the popular will in a general election.”).

B. Associational Burdens in Electing Precinct Committee Officers

Although Washington’s implementation of I-872 is constitutional with respect to partisan elected offices, Washington’s current process for electing the major political parties’ Precinct Committee Officers (“PCO”) does not pass constitutional muster.¹²

All Washington voters receive the same primary ballot regardless of the presence or

¹² Washington and the Grange contend that the Court should refrain from reaching the PCO-election issue because “Washington’s law governing PCO elections is not part of I-872.” (*See* Dkt. No. 239 at 20.) To the contrary, sufficient evidence demonstrates that Washington’s implementation of I-872 affected PCO elections. *See* 08-15 Wash. Reg. 52 (July 11, 2008) (“These rules implement Initiative 872 (top two primary) for partisan public office, and implement the elections for precinct committee officers and president and vice-president in the context of Initiative 872.”); (Dkt. No. 269-4 at 19 (Rule-Making Order explaining, “This change in primary election systems necessitates changes in the administrative rules relating to the format of ballots, and administration of political party precinct committee officer elections.”).) Moreover, Washington and the Grange concede that because the new system no longer serves to determine the nominees of a political party, Washington necessarily eliminated the 10 percent threshold for election of precinct committee officers. (Dkt. No. 255 at 3); *see also* Wash. Rev. Code § 29A.80.051 (“[T]o be declared elected, a [PCO] candidate must receive at least ten percent of the number of votes cast for the candidate of the candidate’s party receiving the greatest number of votes in the precinct.”). I-872 undoubtedly had an impact on PCO elections. Additionally, requiring that the political parties file yet another complaint to reach the merits of this issue would serve no useful purpose, as Washington and the Grange have had ample notice of the allegation and opportunity to respond. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1228, 1248 (9th Cir. 2006) (“We have often said that the public policy favoring disposition of cases on their merits strongly counsels against dismissal. . . . It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.”).

1 absence of a voter's party affiliation, because "the primary does not serve to determine the
2 nominees of a political party but serves to winnow the number of candidates to a final list of
3 two for the general election." *See Wash. State Grange*, 552 U.S. at 453 (quotation marks
4 omitted). Nonetheless, PCOs are elected on the same ballot used in the top-two primary. The
5 parties agree that PCOs are officers of the major political parties, forming the grassroots level
6 of political-party organization. Although PCOs may perform limited public functions, they are
7 not public officials: "Precinct Committee officers organize their local precinct for their party
8" (Dkt. No. 250 at 3.). Unlike candidates in the partisan primary who have the option of
9 listing a party *preference*, candidates seeking election as party PCOs must be members of the
10 political party. *See Wash. Rev. Code* § 29A.80.041. Importantly, voters in the partisan "party
11 preference" races are selecting individuals to serve as members of a government office; voters
12 in the PCO races, on the other hand, are selecting individuals to serve as members of the
13 political parties. This distinction is critical.

14 In *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 230–31
15 (1989), the Supreme Court held that California's restrictions on how parties should be
16 organized and how they select their leaders unconstitutionally burdened political parties'
17 freedom of association. The Supreme Court recognized the strength of a party's interest in
18 selecting its own leaders and noted the important role party leaders play in shaping the party's
19 message. *Id.* at 230, 231 n.21. Applying *Eu* to Arizona's PCO-election scheme, the Ninth
20 Circuit held that "allowing nonmembers to vote for party precinct committeemen violates the
21 Libertarian Party's associational rights. Precinct committeemen are important party leaders
22 who[, like Washington PCOs,] choose replacement candidates for candidates who die or resign
23 before an election." *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1281 (9th Cir.
24 2003). Here, the political parties contend that because all Washington voters receive the same
25 primary ballot, which includes PCO elections, Washington similarly allows nonmembers to
26 vote for party PCOs.

Without more, it seems that *Bayless* plainly holds that Washington's system for electing PCOs is unconstitutional. But it is not so simple. In *Bayless*, Arizona conducted a "semiclosed primary system" in which "voters who are unaffiliated, registered as independents, or registered as members of parties that are not on the primary ballot may vote in the party primary of their choice." *Id.* at 1280. Because Arizona law authorized independent voters and voters registered as affiliating with other political parties to vote for political-party PCOs, Arizona's system was unconstitutional. In Washington, however, PCO candidates appear in a separate location from the partisan "party preference" candidates. More importantly, Washington requires that the ballots state the following: "Precinct committee officer is a position in each major political party. For this office only: *If you consider yourself a democrat or republican, you may vote for a candidate of that party.*"¹³ Wash. Admin. Code § 434-230-100(5)(c) (emphasis added). Accordingly, Washington and the Grange argue that because voters must consider themselves members of either party, Washington law, unlike Arizona law, does not authorize unaffiliated voters or members of third parties to participate in the election of a party's PCO; only voters who have affiliated with or are members of a particular party may vote in the PCO election of that party, and only that party.¹⁴

¹³ Although the administrative code uses lowercase typeface, the ballots use uppercase typeface for "Democrat" and "Republican." (See Dkt. Nos. 242 at 5, 243 at 4, 7.)

¹⁴ In essence, with respect to the PCO elections, Washington has created a blend between an "open primary" and a "closed primary." In an open primary, "the voter can choose the ballot of either party but then is limited to the candidates on that party's ballot." See *Democratic Party of Wash. v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003). Many states operate open primaries, but the Supreme Court has not ruled on whether open primaries comply with the Constitution. See *Jones*, 530 U.S. at 577 n.8 ("This case does not require us to determine the constitutionality of open primaries."). In a closed primary, "only voters who register as members of a party may vote in primaries to select that party's candidates." See *Reed*, 343 F.3d at 1203; see also *Jones*, 530 U.S. at 577 ("Under [a closed-primary] system, even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to 'cross over,' at least he must formally *become a member of the party*; and once he does so, he is limited to voting for candidates of that party."). Here, of course, the voter must "consider" him or herself a Republican or a Democrat before so voting.

1 The Court agrees with the political parties that the personal “consideration” of party
2 association is insufficient to withstand constitutional scrutiny. In *Tashjian v. Republican Party of*
3 *Connecticut*, 479 U.S. 208, 212 (1986), the Republican Party of Connecticut, recognizing the
4 demographic importance of independent voters, adopted an organizational rule that permitted
5 independent (or unregistered) voters to participate in Republican Party primaries. Yet Connecticut
6 enforced a law that required voters in a political primary to register as members of a particular
7 party. *Id.* at 210–11. The Supreme Court held that Connecticut’s law violated the Republican
8 Party’s right to freely associate in part because “the freedom to join together in furtherance of
9 common political beliefs necessarily presupposes the freedom to identify the people who constitute
10 the association.” *Id.* at 214 (quotation marks omitted).

11 Here, Washington’s PCO election similarly infringes on the political parties’ freedom to
12 identify the people who constitute their associations. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640,
13 648 (2000) (“[F]reedom of association plainly presupposes a freedom not to associate.”
14 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984))). The Republican and Democratic
15 parties are not satisfied that the voters’ in-the-moment self-consideration of party association is
16 sufficient to identify its true party members.¹⁵ The system allows the electorate to participate in
17 the selection of the political parties’ officers even though the parties may not prefer to
18 associate with voters who consider themselves members in a fleeting moment in a voting
19 booth. At worst, a voter who has for years expressly affiliated with a rival party may attempt to
20 sabotage the other parties’ election by silently declaring for a fraction of a minute cross-party
21 affiliation. The system allows non-party members to vote for officers of the political parties,
22 and the First Amendment does not permit Washington to impose that type of membership

23
24 ¹⁵ It is merely a distinction without meaning that in *Tashjian* Connecticut attempted to
25 limit the political parties’ voter membership whereas Washington’s system arguably expands
26 party membership. The central holding is that the political parties, not the government, are free
to define the scope of their membership.

1 when the parties have not so consented.

2 The political parties have suggested several alternative methods that would satisfy them
3 that particular voters are indeed members of their respective parties. For example, the political
4 parties have suggested that it would identify as members of its party voters who take a party oath.¹⁶
5 (Dkt. No. 250 at 7–8.) The current system does not facilitate an oath. (*See* Dkt. No. 245 at 12
6 (Information Washington provides its voters explains eligibility in PCO elections: “You do not
7 have to formally join the Democratic or Republican Party, you do not have to sign a party oath,
8 and voting in this election will not put your name on any party lists.”).) The political parties
9 note that they would be satisfied of party membership if voters accepted a separate ballot with only
10 a specific party’s candidates. (Dkt. No. 250 at 6.) The current system does not facilitate separate
11 ballots for PCO elections. The political parties further suggest that they might be satisfied of party
12 membership if a voter checked a box indicating affiliation with the particular party. (*Id.* at 9.)
13 Again, the current system does not facilitate a check box. Regardless of what would satisfy the
14 Republican and Democratic Parties, those parties have made it abundantly clear that they do not
15 accept as members of their respective parties voters who must ask, at the prompting of the ballot,
16 only whether they “consider” themselves party members. *See Democratic Party of Wash.*, 343 F.3d
17 at 1204 (“The Washington scheme denies party adherents the opportunity to nominate their party’s
18 candidate free of the risk of being swamped by voters whose preference is for the other party. . . .
19 Even a single election in which the party nominee is selected by nonparty members could be
20 enough to destroy the party.” (quotation marks omitted)); *see also Jones*, 530 U.S. at 574
21 (“Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves
22 for, and the special protection it accords, the process by which a political party selects a
23 standard bearer who best represents the party’s ideologies and preferences.” (punctuation

24
25 ¹⁶The Democratic Party agrees with the Republican Party’s positions, having joined the
26 Republican Party’s motion for partial summary judgment. (Dkt No. 247 at 1.)

1 omitted)). The system does not allow the political parties to identify their members in a manner
2 they so choose, and it therefore severely burdens the political parties' associational rights.

3 Because Washington's PCO elections severely burden the political parties'
4 associational rights, the Court may uphold the form of those elections only if Washington
5 shows that its election method is narrowly tailored to serve a compelling governmental interest.
6 *See Wash. State Grange*, 552 U.S. at 446. Washington has not provided any such justification
7 that would survive this high standard. *See id.* Accordingly, the Court grants in part the political
8 parties' partial motions for summary judgment.

9 Finally, the Court rejects the political parties' request that the Court enter an injunction
10 ordering that Washington implement its PCO elections in a particular manner. *See generally*
11 *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) ("A mandatory injunction goes
12 well beyond simply maintaining the status quo *pendente lite* and is particularly disfavored.
13 When a mandatory preliminary injunction is requested, the district court should deny such
14 relief unless the facts and law clearly favor the moving party." (punctuation and citations
15 omitted)). As noted earlier, the political parties offer multiple approaches that would satisfy
16 them that only party members select their PCOs. Washington may also decide to implement
17 PCO elections in a manner not yet conceived but ultimately satisfactory to the political parties.
18 Washington may even implement PCO elections in a way that severely burdens the political
19 parties' associational rights but does so in a manner narrowly tailored to serve a compelling
20 governmental interest. Or Washington may decide to stop conducting public elections of
21 PCOs. Given the wide range of options, the Court declines to order an injunction imposing a
22 particular form of election.

23 III. CONCLUSION

24 Put simply, Washington's implementation of I-872 with respect to partisan offices is
25 constitutional because the ballot and accompanying information concisely and clearly explain
26 that a candidate's political-party preference does not imply that the candidate is nominated or

1 endorsed by the party or that the party approves of or associates with that candidate. These
2 instructions—along with voters’ ability to understand campaign issues and the fact that the
3 voters themselves approved the new election system through the initiative process—eliminate
4 the possibility of widespread voter confusion and with it the threat to the First Amendment.
5 The reasonable, well-informed electorate understands that the primary does not determine the
6 nominees of the political parties but instead serves to winnow the number of candidates to a
7 final list of two for the general election.

8 On the other hand, Washington’s method of electing precinct committee officers is
9 unconstitutional because it severely burdens the political parties’ ability to identify and
10 associate with members of their respective parties. Precinct committee officers are grassroots
11 representatives of the political parties, yet all voters, regardless of party affiliation, receive the
12 same candidate ballot and have an opportunity to elect those officers. The political parties have
13 a right to object to Washington’s method of determining party affiliation for these officers, and
14 Washington has not shown that its interests in using this system outweigh the First
15 Amendment’s special associational protections.

16 Accordingly, the Court GRANTS IN PART and DENIES IN PART Washington’s and
17 the Grange’s motions for summary judgment (Dkt. Nos. 239, 249). The Court likewise
18 GRANTS IN PART and DENIES IN PART the Democratic and Republican Parties’ motions
19 for partial summary judgment (Dkt. Nos. 247, 250). The Court STRIKES the trial date. The
20 Court DENIES AS MOOT Washington’s motion to strike certain witnesses (Dkt. No. 287).

21 DATED this 11th day of January 2011.

22
23
24 

25 John C. Coughenour
26 UNITED STATES DISTRICT JUDGE